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No. 95-5661

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JUAN MELENDEZ

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF AMICUS CURIAE OF ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN NEW JERSEY

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EDITOR'S NOTE

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I. INTEREST OF THE AMICUS CURIAE

The Association of Criminal Defense Lawyers of New Jersey has a membership of approximately 550 members who practice criminal defense throughout the State of New Jersey. Many of our members appear regularly, if not exclusively, before the United States District Court. Obviously, the implementation of the Federal Sentencing Guidelines has created a total transformation in the practice of criminal law in the federal courts. Clearly, the provisions of the United States Sentencing Guideline § 5K1.1 plays a critical part in the possible disposition of criminal cases within this federal system. The discretion of the Court to implement this provision upon motion of the government remains a vital aspect of the Guideline scheme. The pending writ raises an important question on the ability of the Court to impose sentencing and the limitations of prosecutorial action. This Association chooses very carefully the cases in which it seeks to appear as amicus curiae. It is the belief of the Association that the instant issue is crucial to the rights of criminal defendants and to the fair administration of justice.

II. SUMMARY OF ARGUMENT

The petitioner maintains that the intent of Congress and the United States Sentencing Commission is clear that the provisions of 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) are implemented by U.S.S.G. § 5K1.1. Therefore, once the government files a motion to the Court stating that a defendant has provided "substantial assistance in the investigation or prosecution of another person who has committed an offense", then the Court has the power to impose a sentence below the applicable guideline or the mandatory minimum set by statute. 18 U.S.C. § 3553(e) was enacted by Congress in 1984 as part of the Omnibus Crime Bill. 28 U.S.C. § 994(n) was also passed by Congress in 1984 as part of the Sentencing Reform Act which provided the enabling legislation for the United States Sentencing Guidelines. Both statutory provisions utilize virtually verbatim language indicating the desire of Congress to reward defendants who cooperate with law enforcement in the investigation or prosecution of another. Both provisions specifically mention the ability of the Court to impose a sentence below the minimum established by statute. Of course, § 3553(e) seemed to limit such power only upon motion of the government. § 994(n) had no such requirement, but explicitly mandated the Sentencing Commission to promulgate a provision that would allow for the imposition of sentences below the mandatory minimum and the applicable guideline. Also, § 3553(e) specifically states that such sentence below the mandatory minimum "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code." The manifestation of such Congressional intent is embodied in U.S.S.G. § 5K1.1.

It seems apparent for a number of reasons that § 5K1.1 fulfills the Congressional mandate and that § 5K1.1 and § 3553(e) was intended to perform the same function. § 5K1.1 utilizes a combination of the same language from the statutory provisions in its formulation. Though § 994(n) has no reference

to a requirement of a government motion, the Sentencing Commission clearly relies on § 3553(e) for that requirement in § 5K1.1. All three provisions reiterate the necessity that a defendant provide "substantial assistance in the investigation or prosecution of another person who has committed an offense." Application note 1 of § 5K1.1 plainly indicates that § 3553(e) and § 994(n) were the enabling legislation for § 5K1.1, because they are referenced as providing the statutory authority for sentences below the mandatory minimum. The general background commentary of § 5K1.1 explains that the "extent and significance of assistance . . . must be evaluated by the court on an individual basis. Latitude is therefore afforded the sentencing judge to reduce a sentence . . ."

The significance of the § 5K1.1 motion is further evidenced by application note 7 of § 2D1.1. The Sentencing Commission explains in the note that a mandatory minimum sentence in drug cases can be waived based on "substantial assistance" and then cites § 5K1.1 as its authority for such position. Can the intent of the Commission be any more clear? This Court has reviewed the provisions of U.S.S.G. § 1B1.7 and held that the commentary in the sentencing guidelines manual that interprets or explains the guideline is authoritative. The commentary of § 2D1.1 and § 5K1.1 made clear the ability of a § 5K1.1 motion to allow for a sentence below the mandatory minimum.

Finally, 28 U.S.C. § 994(o) provided for a mechanism by which a guideline could be revised or amended to conform with the intent of the legislature in enacting the guideline format. If § 5K1.1 did not adhere to the directives of Congress in § 3553(e) and § 994(n), it could have been revised. The majority of the federal appellate courts that have considered this issue have held that a § 5K1.1 allows for a Court to impose a sentence below the mandatory minimum. The inaction of Congress and the United States Sentencing Commission affirms such findings.

III. ARGUMENT

A MOTION BY THE GOVERNMENT PURSUANT TO UNITED STATES SENTENCING GUIDELINE § 5K1.1 ALLOWS THE COURT TO IMPOSE A SENTENCE BELOW THE MANDATORY MINIMUM SET BY STATUTE

The issue presently before this Court involves allowing judges to judge and prosecutors to prosecute. Such simplistic language succinctly frames the context of the argument. The instant petition requests that this Court determine that the provisions of Title 18 United States Code (U.S.C.) § 3553(e) is implemented by the United States Sentencing Guideline (U.S.S.G.) § 5K1.1 rather than posing two separate mechanisms. This Court recognized this looming problem in Wade v. United States, 504 U.S. 181, 185 (1992) and now has the opportunity to address it. Juan Melendez, the petitioner in the instant matter, was granted a motion by the government pursuant to U.S.S.G. § 5K1.1, but such motion did not also utilize the language of 18 U.S.C. § 3553(e). The lower courts found that the sentencing court did not have the power to impose a sentence upon Mr. Melendez below the statutory mandatory minimum of ten years. Such determinations were contrary to the majority of federal appellate courts that have reviewed this precise issue. The will of Congress and the United States Sentencing Commission seems frustrated by such a limited reading of the applicable legal provisions. The fundamental framework of our government and legislative intent necessitate that this Court find error below and remand this matter for resentencing.

The Sentencing Reform Act of 1984 created the United States Sentencing Commission and evidenced a clear intent on the part of Congress to reform the sentencing process in federal court with the use of sentencing guidelines. In Mistretta v. United States, 488 U.S. 361 (1989) this Court found that the structure of the Commission did not violate the doctrine of separation of powers

and did not result in excessive delegation of legislative power to the Commission. The enabling legislation for the implementation of these guidelines is codified in 28 U.S.C. § 991 et. seq. and demonstrates the broad powers that Congress was imparting to the Commission. For instance, 28 U.S.C. § 991(b) explains that the purposes of the Commission are to establish sentencing policies that meet the goals of 18 U.S.C. § 3553(a)(2) and provide fairness in meeting the purposes of sentencing "while maintaining sufficient flexibility to permit individualized sentences when warranted. . ." 28 U.S.C. § 994 explains the various factors the Commission should consider in the promulgation of the guidelines. Subsection (n) of § 994 more specifically mandates that the Commission must produce guidelines that "reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."

There can be no question that the Sentencing Commission carried out the mandate given it by Congress in 28 U.S.C. § 994(n) by the promulgation of U.S.S.G. § 5K1.1. The initial version of the guideline stated

> Upon motion of the government stating that the defendant has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person who has committed an offense, the Court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that

may include. but not limited to, consideration of the following conduct:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness. and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered. or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Though there have been more than 500 amendments to the sentencing guidelines since their effective date of November 1, 1987, this very important and often used provision was only amended once effective November 1, 1989 to delete "made a good faith effort to provide" and insert in lieu thereof "provided". Therefore. in the more than eight years that this guideline provision has been implemented. only one minor amendment was deemed needed to clarify its wording. The phrasing that the "appropriate reduction shall be determined by the Court" has remained without any limiting language for mandatory sentencing.

28 U.S.C. § 994(o) provides the Congressional authorization for the Sentencing Commission to "review and revise. in consideration of comments and data coming to its attention. the guidelines promulgated pursuant to the provisions of this section." It appears clear that both Congress and the U.S. Sentencing Commission feel confident that the present phrasing of § 5K1.1 satisfies the concern of rewarding defendants who provide substantial assistance in the investigation or prosecution of another person. It is noteworthy that the only added element in § 5K1.1 from the mandate of § 994(n) seems to be the requirement of a motion by the government. Otherwise, it appears that the language seems to be virtually verbatim between the two provisions.

It is quite possible that the requirement of a government motion was taken from the statutory provisions of 18 U.S.C. §3553(e). This law was passed in 1984 as part of the Omnibus Crime Bill and states:

> (e) Limited authority to impose a sentence below a statutory minimum ---- Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

Therefore. both 18 U.S.C. § 3553(e) and 28 U.S.C§ 994(n) are passed by Congress on October 12. 1984 and should be read in conjunction with each other. especially given the similarity in language and purpose. § 3553(e) even specifically cites 28 U.S.C.§ 994. These statutes must be considered as embodying a clear Congressional intent to reward cooperation by defendants.

The United States Sentencing Commission sought to implement the will of Congress by the formulation of U.S.S.G. § 5K1.1. The Commission added the requirement of a government motion that was omitted in § 994(n) but included in § 3553(e). The guideline serves as an almost verbatim recitation of the language in the two statutes. The Commentary to § 5K1.1 further makes clear the connection among the various provisions. Application Note 1 of § 5K1.1 cites both §3553(e) and § 994(n) and then explains how "substantial assistance ... may justify a sentence below a statutorily required minimum sentence." Clearly, § 3553(e) must be read in conjunction with § 5K1.1. U.S.S.G. § 1B1.7 reveals that the Commentary that accompanies the guideline serves many functions. It can help interpret the guideline or explain how it is to be applied and can also provide factors considered in promulgating the guideline. This Court has held in Stinson v. United States, 113 S.Ct 1913, 1915 (1993) that the Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it "violates the Constitution or a federal statute, or is consistent with, or a plainly erroneous reading of, that guideline." Stinson states that the commentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice. 113 S. Ct. at 1918. The entire provision of U.S.S.G. § 5K1.1 is a policy statement, but this Court has held that "the principle that the Guidelines manual is binding on federal courts applies as well to policy statements." 113 S.Ct. at 1917. See also Williams v. United States, 112 S.Ct. 1112 (1992). A complete reading of § 5K1.1 and its commentary makes clear that § 3553(e) and

§ 994(n) are implemented by this guideline provision. No amendment to this provision has been offered by Congress or the Sentencing Commission to suggest the contrary. Apparently, the legislative branch of government and the Commission are satisfied that the plain language of § 3553(e), § 994(n), and § 5K1.1 have satisfactorily effectuated the intent of Congress.

There is further language in the Federal Sentencing Guidelines that makes clear that § 3553(e) and § 5K1.1 are not separate mechanisms. In addition to Application Note 1 of 5K1.1, the guideline provision also adds further indications of the interplay between the statute and guideline. The background notes to the Commentary to § 5K1.1 explain that the "nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the Court on an individual basis. Latitude is therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above . . ." Can there be any clearer language that the Sentencing Commission intends that ultimate discretion as to the extent of a downward departure should rest with the sentencing court? The background notes of § 5K1.1 continue by noting that reasons for reducing the sentence should be stated pursuant to 18 U.S.C § 3553(c). Obviously, the Commission was acutely aware of the provisions of § 3553. If there was any thought that § 5K1.1 would not also allow for a sentence below the mandatory minimum required by statute, the Commission would have certainly put in such a caveat. Congress could have perceived that federal appellate courts were misinterpreting the provisions of § 3553(e) and § 5K1.1 as early as 1991 in decisions such as United States v. Keene, 933 F.2d 711 (9th Cir. 1991) and United States v. Cheng Ah-Kai, 951 F.2d 490 (2d Cir. 1991). Yet, no effort was made by the legislative body to implement 28 U.S.C. § 994(o) and revise § 5K1.1 to make it clear that sentencing courts could not utilize the provision to sentence below the mandatory statutory term without a government motion pursuant to 18

U.S.C. §3553(e).

Another clear indication of the Sentencing Commission's understanding and intent regarding § 5K1.1's interplay with mandatory sentencing can be found in Application Note 7 of U.S.S.G. § 2D1.1. It states:

> Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense". See § 5K1.1 (Substantial Assistance to Authorities).

The Second Circuit in Cheng Ah-Kai cites this application note in support of its position that § 3553(e) was contemplated when § 5K1.1 was drafted by stating that the "commentary supports the contention that the Sentencing Commission perceives § 5K1.1 as covering departures both from "mandatory (statutory) minimum" sentences and from the guidelines." 951 F.2d at 493. This court in Stinson suggested a presumption "that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the commission deems that the guidelines should be applied to be consistent with the guidelines manual as a whole as well as the authorizing statute." 113 S. Ct. at 1919.

The majority of the federal appellate courts that have

reviewed this precise issue agrees with the position of the petitioner, Juan Melendez. The Second, Fifth, Seventh, and Ninth Circuits have all explicitly held that a government motion pursuant to §5K1.1 allows the sentencing court to impose a sentence below the statutory mandatory minimum. Prior to the Third Circuit opinion in the instant matter, only the Eighth Circuit had found that a separate motion pursuant to 18 U.S.C. § 3553 was needed to avoid a statutory minimum sentence.

The Ninth Circuit was the first appellate court to directly confront this issue in United States v. Keene, 933 F.2d 711 (9th Cir. 1991). The defendant had pled to a cocaine amount mandating a minimum sentence of ten years under the applicable drug statute in Title 21. The government moved for a downward departure from the guidelines based on the defendant's cooperation in the conviction of several codefendants. However, the prosecution sought to clarify during the sentencing hearing that the government's motion was pursuant to § 5K1.1 and not § 3553(e). This was substantially the same scenario as in the instant matter. However, the Ninth Circuit, unlike the Third Circuit, believed that "once the government filed a motion for departure based upon Mr. Keene's substantial assistance, it was within the sentencing court's authority to exercise its discretion in determining the appropriate extent of departure." 933 F. 2d at 715. The Keene Court noted the substantial cross references that exist among § 5K1.1, § 3553(e) and § 994(n) and that all three must be read together. 933 F.2d at 714. It seemed very clear to the Ninth Circuit that 5K1.1 implements the directive of 994(n) and 3553(e). Later that same year the Second Circuit relied substantially on the Keene holding in United States v. Cheng Ah-Kai, 951 F.2d 490 (2d Cir. 1991) to also find that the sentencing court has discretion to depart below the statutory minimum sentence once the government files a § 5K1.1 motion.

The procedural history of both cases was similar. The

government took the position that the District Court had no discretion to impose a sentence below the statutory minimum without the motion pursuant to 18 U.S.C. § 3553(e). The Second Circuit engages in a thorough analysis of the applicable legal provisions by reviewing the language of the Commentary in U.S.S.G. § 2D1.1 and § 5K1.1. Application note 7 of § 2D1.1 was found to support "the contention that the Sentencing Commission perceives § 5K1.1 as covering departures both from 'mandatory (statutory) minimum' sentences and from the guidelines." 951 F.2d at 493. Application Note 1 of § 5K1.1 signified to the Court "that § 3553(e) was contemplated when § 5K1.1 was drafted and leads to the conclusion that the Sentencing Commission intended that § 5K1.1 serve as a conduit for the application of § 3553(e)." 951 F.2d at 493.

However. the Eighth Circuit had a contrary view of this issue in United States v. Rodriguez-Morales, 958 F.2d 1441 (8th Cir. 1992). The defendant had faced a guideline range of 235-295 months in prison based on a large quantity of cocaine base. The government filed a motion pursuant to § 5K1.1 based on the defendant's substantial assistance against another individual. However. the government stressed that its motion "in no way alters or affects the mandatory minimum sentence applicable in this case" of 120 months. Id. at 1442. But the District Court felt otherwise and sentenced the defendant to 36 months imprisonment by relying on United States v. Keene, 933 F.2d 711 (9th Cir. 1991). The Eighth Circuit reversed that judgment and explained that "section 5K1.1 by its plain terms makes no mention of departures below mandatory minimums-only departure from the Guidelines range." Id. at 1444. The Court further reasoned that the commentary to § 5K1.1 also did not "explicitly state that a motion under the guideline authorizes departures below the statutory minimum." Id. at 1444. Such an extremely narrow reading of § 5K1.1 may be technically correct. but obviously fails to accept the clear intent of the language when read in the context of the enabling legislation

of 28 U.S.C. § 994(n). Such interpretation also clearly ignores the explicit language of application note 7 of U.S.S.G. § 2D1.1. The majority fails to even mention such commentary, which clearly indicates the intent of the Sentencing Commission to utilize § 5K1.1 to "waive" and not impose a statutory minimum sentence.

Far more persuasive is the reasoning of Judge Heaney in the Rodriguez-Morales dissent. Judge Heaney engages in a very thorough analysis of all the pertinent statutes. guidelines. and commentaries. Such analysis is instructive. It reviews the application note 1 of § 5K1.1 and focuses on the phrase "circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n)." It reasons that such circumstances "can only be a government motion for substantial assistance. Thus. the commentary informs courts that a § 5K1.1 motion . . . permits a court to depart below the mandatory minimum sentence. Any other reading renders the application note mere surplusage." 958 F.2d at 1448. Judge Heaney also took significance from the fact that the application note was not simply in a section labeled background. He believed that application notes helped define terms and explain how the guideline should be applied, while background was general and oriented toward the rationale behind the guideline. Id. at 1448. Finally, the dissent suggests that the explicit language of application note 7 of § 2D1.1 makes sense because most mandatory sentences involve drug cases. It states that given "the irrelevance of mandatory minimums for most crimes, it is not surprising that the Commission did not mention the availability of a departure below a mandatory minimum in the body of section 5K1.1" but rather "in the application notes accompanying section 5K1.1 and in the section where mandatory minimum sentences are most important (section 2D1.1)." 958 F.2d at 1449-1450. A recent opinion interpreting this Court's holding in Stinson stated that when "a court ventures to determine whether the Commission's commentary tracks the guidelines, the degree of deference is at its zenith. United States v. Labonte, No. 95-1538, (1st Cir.

December 6, 1995), slip op. at 12.

Subsequently, decisions were written in the Fifth and Seventh Circuits that refused to follow the view of the Eighth Circuit and joined the rationale of the Ninth and Second. In United States v. Beckett, 996 F.2d 70 (5th Cir. 1993) and United States v. Wills, 35 F.3d 1192 (7th Cir. 1994) the Courts found that § 5K1.1 effectively implemented the dictates of § 3553(e) and § 994(n). The scenario in the Beckett case differs somewhat from the facts of the other precedents because the defendant was facing sentencing on a gun charge pursuant to 18 U.S.C. § 924(c) carrying a mandatory five year term of imprisonment and on a cocaine charge without a mandatory requirement by statute. The government filed a § 5K1.1 motion, but explicitly advised the District Court in an amended motion that the government was not moving pursuant to § 3553(e).

Therefore, the government maintained that the Court had no power to impose any sentence on the gun charge other than five years. The District Court agreed and imposed a five year term on the gun charge. The Court granted the § 5K1.1 motion for the drug charge and imposed a consecutive sentence of 20 months imprisonment which departed from the applicable range of 33-41 months. The Fifth Circuit disagreed and found that the § 5K1.1 motion gave the Court discretion regarding the gun charge also. The Court stated it found the analysis of the Cheng Ah-Kai and Keene decisions more persuasive than that of Rodriguez-Morales. 996 F.2d at 74. It considered the applicable statutes and guidelines and stated:

> . . . there is a direct statutory relationship between § 5K1.1 and § 3553(e) of such a character as to make § 5K1.1 the appropriate vehicle by which § 3553(e) may be

> implemented . . .
>
> the government is clearly authorized to determine whether a defendant's cooperation amounts to substantial assistance . . . However, once the motion is filed, the judge has the authority to make a downward departure from any or all counts, without regard to any statutorily mandated minimum sentence.

996 F.2d at 74-75.

The Seventh Circuit in Wills found that the District Court correctly interpreted Congressional intent in § 994(n) being implemented by § 5K1.1. The Court believed that the decision by the Sentencing Commission to make no distinction between downward departures below the guideline range and the mandatory minimum was a "reasonable interpretation of congressional intent, and therefore one to which we owe deference because the Sentencing Commission has been charged by Congress with administration of the statute." 35 F.3d at 1195-1196. The Court looked to the applicable provisions and concluded that they "place on the shoulders of the district court the responsibility to determine the extent of the departure." 35 F.3d at 1196. But the dissent in Wills also offers some valuable insight into the weakness of the government position. The dissent gives the following rationale:

> Section 3553(e) and Guideline 5K1.1 permit a prosecutor to offer a reward for assistance. This process works best if the amount of the reward can be

> graduated to the value of the assistance-a value the prosecutor (who sees the full menu of crimes and potential cases in the district) can assess better than a judge. By holding that a motion under either § 3553(e) or § 5K1.1 permits the judge to give any sentence he deems appropriate, the majority curtails the prosecutor's ability to match the reward to the assistance.

35 F.3d at 1198. Such logic flies in the face of reality and the traditional roles performed by prosecutors and judges. A judge is the neutral participant in the criminal justice process, who can dispassionately assess the merits portrayed in the adversarial system. It is actually the judge who can best assess the appropriate reward to be given a defendant who cooperates. There is no vested interest at stake for the judge. No undue pressures are brought to bear upon the role of the judge in the sentencing process. The prosecutor may perceive certain pressures from victims, society, or superiors to obtain a certain period of incarceration for a defendant. Of course, the prosecutor retains the power under § 5K1.1 to determine whether "substantial assistance" was given. But the extent of departure should remain within the traditional powers of the Court. The other argument offered by the dissent is equally unavailing. The concern is raised that there will be fewer § 5K1.1 motions filed if the majority in Wills is followed. Such consequence is unlikely to happen. Prosecutors need cooperation. Any perception by the criminal defense bar or by defendants that the government is exercising its power under § 5K1.1 in an arbitrary fashion could have a chilling effect on efforts of cooperation.

The majority of the Court below in United States v.

Melendez, 55 F.3d 130 (3d Cir. 1995) relies significantly on the dissent in Wills for its rationale. The Third Circuit cites the policy considerations mentioned in the Wills dissent such as the prosecutor being better able to assess the value of cooperation and fear of fewer such motions. 55 F.3d at 135. Such concerns, as noted above, are not based in the reality of the criminal justice system. The Melendez Court also relied on the text of 28 U.S.C. § 994(n) to maintain that Congress did not use that statute to take back the exclusive powers of the prosecutor vested in § 3553(e). 55 F.3d at 134. But such argument also fails because the Court disregards the fact that these statutes must be considered jointly because both were enacted by Congress in October 1984 and § 3553(e) cross-references § 994. Obviously, Congress considered these statutes in conjunction with each other. U.S.S.G. § 5K1.1 is the manifestation of the Congressional mandate. Also, the Melendez majority fails to even mention the application note 7 of § 2D1.1 which makes the Sentencing Commission intent clear. The well-reasoned dissent in Melendez considers the legislation as a whole and also addresses the policy considerations. Judge Huyett reviews application note 1 of § 5K1.1 and states that "this note expresses the Sentencing Commission's intent that § 5K1.1 serve as a 'conduit' for the application of § 3553(e)." Id. at 137. He also believes that application note 7 of § 2D1.1 is illustrative because the "reference to § 5K1.1 rather than to § 3553(e) illustrates the Commission's determination that departures from the statutory minimum sentence are a mere subset of departure from the guidelines." Id at 137. The total discretion in the hands of the prosecutor raises the policy concerns of sentencing disparity given no appellate review and the usurpation of the Court's discretion. Id. at 137.

There are other case precedents that offer some insight into the instant issue. Though the Fourth Circuit did not have this exact issue before it because the government never filed any cooperation motion, United States v. Wade, 936 F.2d 169 (4th Cir. 1991), affirmed on other grounds, 504 U.S. 181

(1992), it offered its view of the power of a § 5K1.1 motion:

> Section 5K1.1 governs all departures from Guidelines Sentencing for substantial assistance, and its scope includes departure from mandatory minimum sentences permitted by 18 U.S.C. § 3553(e) . . .
>
> Once a motion by the government is filed, the Court must exercise discretion in determining the appropriate level of departure, which may, when justified by the facts, be more or less than that recommended by the government.

936 F.2d at 171. Such definitive language seems to leave little doubt as to how the Fourth Circuit would rule on the instant matter. The respective roles of the prosecutor and judge in the § 5K1.1 context have been explained by many courts. In United States v. Pippin, 903 F.2d 1478, 1485-86 (11th Cir. 1990) the Court held that the government cannot limit the power of a § 5K1.1 motion only for the fine portion of a sentence and not the length of jail by explaining that once "it has made a § 5K1.1 motion the government has no control over whether and to what extent the District Court departs" from the guidelines except for reasonableness. See also United States v. Udo, 963 F.2d 1318 (9th Cir. 1992). The Third Circuit had even previously affirmed a departure below the government recommendation in United States v. Spiropoulos, 976 F.2d 155, 163 (3d Cir. 1992) under the

rationale that "having set the section 5K1.1 downward departure process in motion, the government cannot dictate the extent to which the court will depart."

Possibly the most articulate and succinct argument that can be made on behalf of Mr. Melendez is contained in a concurring opinion of the same Third Circuit in United States v. Tannis, 942 F.2d 196 (3d Cir. 1991). The Tannis case involved a young woman who was convicted of a cocaine base offense that required a ten year term of imprisonment and no cooperation motion was filed by the government. Though such facts are obviously different from those of Mr. Melendez, the words of concurrence by Judge Higginbotham seem applicable here. He cautioned that when "we remove all discretion from trial judges and preclude them from making individual determinations . . . it is doubtful whether society benefits on either a long term or short term basis." Id. at 198. The concurrence concludes with the following paragraph that suggests general frustration with mandatory sentencing, but also speaks volume about how the system should work:

> Judges and legislators must always remember that ultimately we are not sentencing widgets or robots, but human beings. I am not suggesting that human frailties and crimes should be ignored. Nevertheless convicted defendants should be sentenced within the spectrum of what most able judges would consider fair and reasonable both for our society and for the sentenced defendant.

942 F.2d at 199. Such view may seemingly have no relevance regarding the instant petition. But the concept of ultimate Court discretion in sentencing is important. Of course, the instant appeal is not challenging the power of Congress to mandate a minimum sentence in certain crimes. See Chapman v. United States, 500 U.S. 453, 467 (1991). It also does not question the exclusive powers of the government to file the appropriate cooperation motion. The appeal simply questions the unbridled power vested in the government to determine the appropriate sentence, even when it acknowledges to the Court that a defendant provided substantial assistance. Congress did not intend such power to be transferred to the Executive branch.

There can be no question that the Third Circuit misinterpreted the Congressional intent of the applicable legal provisions in the instant matter. The majority of the Circuit Courts that have analyzed the provisions have sided with the view of Mr. Melendez. Obviously, the lack of action on the part of Congress or the Sentencing Commission to try to clarify § 5K1.1 on this point makes it clear that such provision does implement the Congressional intent of § 3553(e) and § 994(n).

IV. CONCLUSION

Therefore, it is respectfully requested that the judgment of the Third Circuit Court of Appeals in the instant matter be vacated and the case be remanded for resentencing with directions that the District Court be authorized to consider the imposition of a sentence below the mandatory minimum term set by statute.

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